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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|-----------------------|---|-----------------------|
| PETER BROWN, |) | |
| |) | |
| Appellant-Petitioner, |) | |
| |) | |
| vs. |) | No. 49A02-0606-PC-501 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Respondent. |) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-9109-CF-128567

March 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Peter Brown challenges the denial of his petition for post-conviction relief. Specifically, Brown argues that the post-conviction court erred when it denied his petition because the trial court imposed a “harsher, different punishment” than what his plea agreement allowed. Appellant’s Br. p. 12. Because Brown has procedurally defaulted this claim and his argument is moot, we affirm the judgment of the post-conviction court.

FACTS

On September 26, 1991, a grand jury indicted Brown for the murder of Stephen Harrer. On December 31, 1991, Brown entered into a plea agreement with the State, which specified that he would plead guilty to class C felony reckless homicide and that the State would recommend a four-year sentence with one year suspended, with the executed time to be split evenly between the Department of Community Corrections (the DCC) and a work release program. On February 6, 1992, the trial court accepted Brown’s guilty plea and sentenced him pursuant to the terms of the plea agreement.

On May 11, 1992, the State filed a notice alleging that Brown had violated the DCC rules. The trial court held a hearing on June 17, 1992, and found that Brown had violated the DCC rules. As a consequence, the trial court modified Brown’s sentence and required him to serve the remainder of the executed portion of the sentence at the DCC instead of in a work release program.¹ Brown did not pursue a direct appeal from the trial court’s modification.

¹ The trial court did not impose the suspended portion of Brown’s sentence and, instead, ordered that he serve the entire portion of his executed time in the DCC.

Brown completed the remainder of his sentence at the DCC and was released on July 11, 1994.

On May 2, 2005, Brown filed a pro se petition for post-conviction relief, arguing that the trial court erred when it deviated from the terms of his plea agreement and ordered that he serve the remainder of his sentence at the DCC. The post-conviction court summarily denied relief, finding that the issue was moot. Brown now appeals.

DISCUSSION AND DECISION

Brown argues that the trial court erred by requiring him to serve the remainder of his sentence at the DCC instead of in a work release program as required by the plea agreement. Specifically, Brown contends that “the [S]tate breached its contract with the defendant and applied, ex post facto, a harsher sentence than originally contemplated and set out under the terms of the written [plea] agreement.” Appellant’s Br. p. 1.

We initially observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. McCarty, 802 N.E.2d at 962. Post-conviction procedures do not afford petitioners the chance for a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, post-conviction procedures create a narrow remedy for subsequent collateral challenges to convictions based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post-Conviction Rule 1(1). If an

issue was known and available on direct appeal but not raised, it is procedurally defaulted as a basis for relief in subsequent proceedings. Gray v. State, 841 N.E.2d 1210, 1213 (Ind. Ct. App. 2006), trans. denied.

Brown's argument fails for two reasons. First, Brown could have pursued a direct appeal challenging the trial court's June 17, 1992, sentence modification, but he did not do so. Therefore, Brown has procedurally defaulted his claim and cannot raise it for the first time in a post-conviction petition filed almost thirteen years after the trial court's order. Gray, 841 N.E.2d at 1213.

Second, Brown has served the sentence he challenges and was released from the DCC on July 11, 1994. Our court does not "engage in discussions of moot questions or render advisory opinions." Irwin v. State, 744 N.E.2d 565, 568 (Ind. Ct. App. 2001). "[O]nce the appellant's sentence has been served, the issue of the validity of the sentence is rendered moot." Id. Because Brown has served his sentence, we cannot grant him relief and his argument is moot.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.